United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2625

UNITED STATES COURT OF APPEALS

For the Second Circuit.

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P/S

Docket No. 74-2625

ARTHUR L. STAIR and BERNICE STAIR,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal From the United States District Court for the Northern District of New York

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REPLY BRIEF FOR APPELLANTS, ARTHUR L. STAIR and BERNICE STAIR

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CITATIONS.

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REPLY BRIEF FOR APPELLANTS, ARTHUR L. STAIR and BERNICE STAIR

Statement of Issue Presented.

By their mere execution of an administrative Form 870-AD (and not a statutory final closing agreement), are the taxpayers equitably estopped, the statute of limitations having run against any further government assessment, from seeking a refund of collected taxes?

Statement of the Case.

The plaintiffs-appellants-taxpayers seek a refund of taxes in the amount of $39,502.54, plus interest, alleged to have been illegally and

erroneously collected. The underlying substantive question is that of "ordinary income versus capital gains". In the United States District Court for the Northern District of New York, Judge Port, finding the taxpayers estopped from seeking a refund by their having executed a Form 870-AD, granted the defendant-appellee-government's motion for summary judgment and dismissal. This is an appeal from the judgment so entered.

Statement of Facts.

(See appellants' main brief)

POINT 1

The District Court's finding is erroneous since none of the four elements requisite to a finding of equitable estoppel is present in this case.

The Government persists in twisting and turning in its attempt to fit the instant case into the "four-elements" equitable estoppel test.(appellee's brief, pp. 8-9). The taxpayers urge that their case cannot be so classified and, indeed, that to do so would be contrary to the fundamental thrust of the test.

First, there was no false misrepresentation or misleading silence. The taxpayers negotiated and settled with the Internal Revenue Service in good faith and had no intention of filing for a refund until their counsel advised that a new case expressly supported such a claim.

Second, there was no error in a statement of fact. The "error-of-fact" contemplated by the test comprises a substantive

inaccuracy found to have undermined or prejudiced an effected settlement, such as an error in reporting, calculating or record-keeping, or a present statement by a taxpayer (during negotiations) as to his conduct or intentions with respect to a particular previous tax-generating situation; such an error would support an estoppel, whereas an error of law or opinion would not. Clearly, the Stairs committed no such factual error; they seek merely to show that a refund is merited because of a demonstrated change in the applicable law since the settlement was effected. The appellee, however, wrongly stretches the intent of that element of the test and the plain meaning of its words in suggesting that the signing of an administrative Form 870-AD and the subsequent filing of a refund claim can and does amount to such an error of fact.

Finally, to find that the United States did not know the true facts in this case or that it would be adversely affected by the successful prosecution of a claim for refund is to ignore both the statutory framework and the realities of the Service's administration of tax cases. IRS well knew that the cornerstone of its settlement with the taxpayers here was an administrative and non-binding Form 870-AD -- not a final closing agreement. While it could hope that, as in the great number of other cases "finally" settled by non-statutory means, the taxpayers would not seek to re-open their case, the Service had no <u>binding</u> assurance thereof and, indeed, <u>had</u> to be aware of a long line of cases holding that such administrative settlements are not binding. When the Service chooses not to secure closing agreements, it is opting for expediency; having done so, it must pay the price of such a choice.

POINT 2

The District Court exceeded its authority by finding that the appellant Arthur Stair had acted fraudulently ("playing the card...close to his chest" [App., p. 37a]; "studied silence" [App., p. 39a]) and that the United States had intended to effect a final settlement of the claim through its use of a Form 870-AD.

This case was considered by the District Court upon a motion for summary judgment, wherein the Government contended that there were no unresolved issues of fact and that the case was ripe for decision as a matter of law. The Court was to evaluate the facts as stipulated between the parties.

But the Court below exceeded its authority by drawing unwarranted inferences from the stipulated facts and deciding what the parties intended by their respective courses of conduct. First, the Court inferred that the IRS by its actions intended to settle the tax controversy with finality. In view of the clear statutory and non-statutory settlement alternatives open to it, it was certainly a question of fact -- not resolvable upon a motion for summary judgment -- as to what the Service intended.

Second, from the mere fact that the taxpayers filed their claim after the statute of limitations had run against further IRS assessment, the Court inferred that the taxpayers had fraudulently misled the government by "studied silence". The issue of the taxpayers' intent in filing a refund claim is unresolved, and it was not the province of the District Court to decide such a factual issue.

POINT 3

The District Court and the appellee United States would reject the statutory right of appellants-taxpayers to file a refund claim after the statute of limitations on assessment had run against the Government.

The thrust of the appellee's argument in general, and the impact of the District Court's decision, is that taxpayers should automatically be estopped from seeking a refund of taxes paid whenever they have executed a Form 870-AD and the statute of limitations has run against further assessment. One problem with such an argument is that the cases, especially those discussed within the appellants' main brief, have never reached such a conclusion.

Moreover, in urging such an automatic estoppel the Court below and the appellee would ignore and abolish the existing and long-standing statutory framework which often results in taxpayers' having more time than the Government in which to challenge or upset tax determinations. For example, suppose that a taxpayer filed his 1974 income tax return on April 15, 1975. An audit is conducted, and on April 15, 1977 the case is settled with the taxpayer paying the deficiency found to be due. Under these circumstances the Internal Revenue Code grants the taxpayer two years, or until April 15, 1979, in which to file a claim for refund, whereas the Government's period within which to assess a further deficiency expires on April 15, 1978, three years from the due date of the return. Code Sections 6511(a)* and 6501(a), respectively. Thus, whenever an audit is not

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*2 years from the date of payment or 3 years from the due date of the return, whichever is later.

completed until more than one year after the due date of the return, the Government is by law placed at a "disadvantage".

In the instant case, the Stairs' 1964 return was duly filed on or before April 15, 1965. Some one and three-quarters years later, on December 30, 1966, the taxpayers paid the amount of the deficiency as settled. At that point in time, by statute, the taxpayers had until December 30, 1968 to file a claim for refund (Sec. 6511(a)), while the Government had only until April 15, 1968 to assess any further deficiency (Sec. 6501(a)).

The Court below and appellee herein would rewrite these statutes to deny the "two-years-from-date-of-payment" refund alternative to any taxpayer who executes an administrative Form 870-AD. Appellee would then, in effect, balance the taxpayers' "three-years-from-due-date-of-return" limitation on refunds against the Government's "three-years-from-due-date-of-return" limitation on assessment, and call it "even". But if Congress has never seen fit so to revise the law, the Internal Revenue Service should not be so permitted to elevate and sanctify its administrative procedures as to bar a taxpayer from exercising his statutory right.

CONCLUSION

The Court below exceeded its authority in deciding factual issues upon unwarranted inferences, none of the circumstances of this case support an estoppel and to find such an estoppel here would be to deny the appellants their clear

statutory right to seek a refund. Accordingly, the District Court's judgment should be reversed and the matter be allowed to proceed to a determination on the merits.

Respectfully submitted,

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MEMO-LETTER®

TO Clerk
United States Court of Appeals
United States Courthouse
Foley Square
New York, New York 10007

DATE April 8, 1975

SUBJECT Stair vs. U.S.A.
#74-2625
Appellants' Reply Brief

Greetings:

Enclosed please find 25 copies of our Reply Brief in the above-mentioned matter, and my affidavit of service of 3 copies of the brief upon opposing counsel.

Very truly yours,

STEARNS & STEARNS

By: _____
PAUL E. POOL

PEP:pam
Encs.

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Index No. 74-2625
STAIR vs. U.S.A.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF Broome

ss.:

PAUL E. POOL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Binghamton, New York

That on the 8th day of April 1975

deponent served the within REPLY BRIEF

upon J. Ross Macbeth, Esq.

attorney(s) for Defendant-Appellee

in this action, at Review Section, Tax Division
U.S. Dept. of Justice
Washington, D.C. 20530

the address designated by said attorney(s) for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Paul E. Pool

Sworn to before me, this 8th day of April 1975

Paul G. Stevens

[redacted]